No. 365.

In the Supreme Court of the United States,

October Term, 1900.

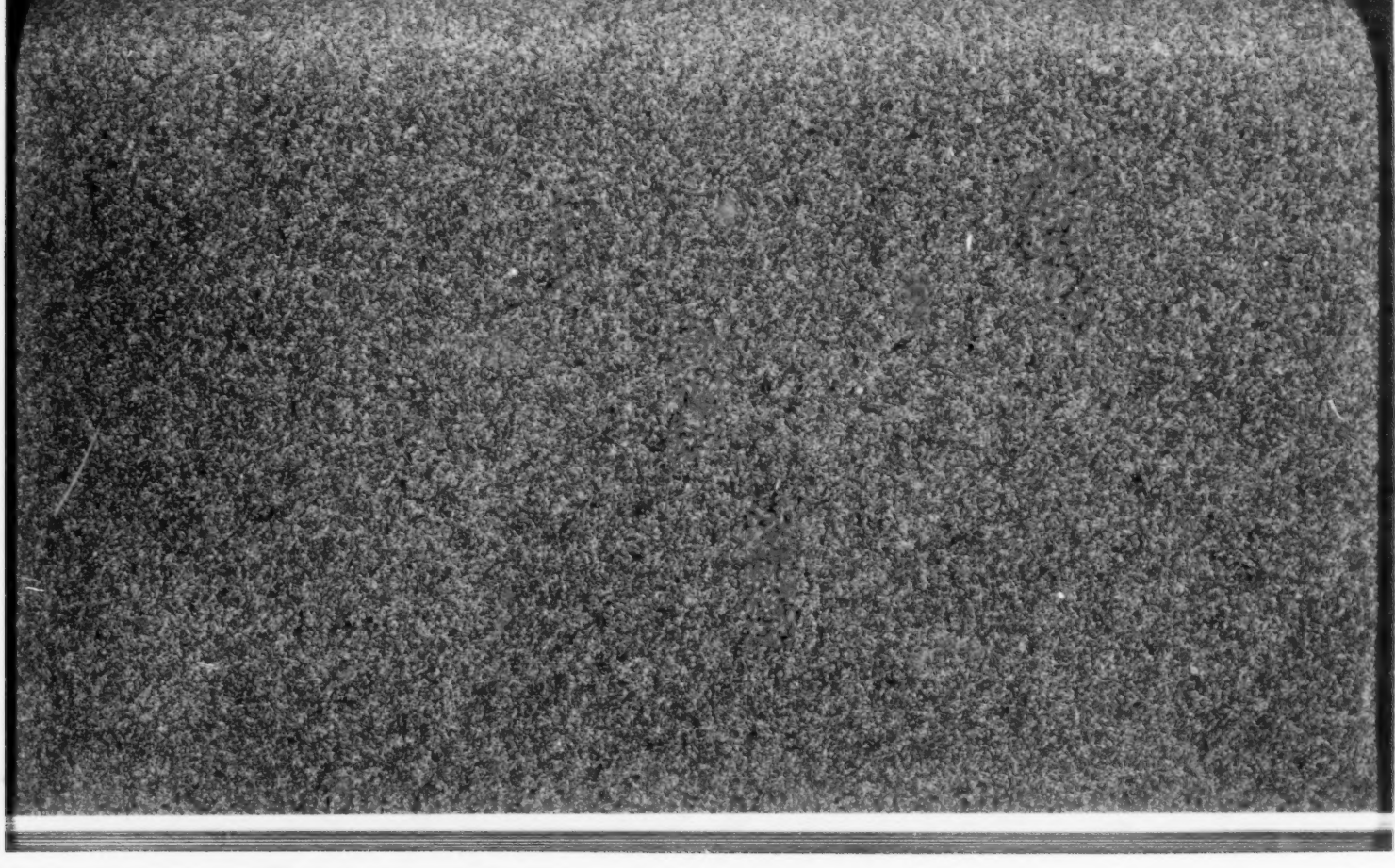
THEODORE H. PEASE, Appellant,

v.

WILLIAM HENRY, United States Marshal for the Southern District of New York, et al.

Appeal from the circuit court of the United States for the southern district of New York.

BRIEF FOR APPELLANT.



In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THEODORE H. PRICE, APPELLANT,
v.
WILLIAM HENKEL, UNITED STATES MARSHAL for the Southern District of New York, et al. } No. 385.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The appellant Price was, on March 1, 1909, committed by United States Commissioner Shields to the custody of the appellee, the marshal for the Southern District of New York, to await the issuance of a warrant for appellant's removal to the District of Columbia for trial upon indictments found against him therein (Rec., 149), the commissioner having found probable cause to believe appellant guilty. (Rec., 194.)

The indictments upon which these removal proceedings are based are two of those involved in the appeal of Moses Haas (No. 367).

The removal proceedings against Price were instituted November 30, 1908, at the conclusion of those against Haas (Rec., 10). The Government

rested after introducing certified copies of the indictments Nos. 26088 and 26089 (Rec., 112, 137) and bench warrants (Rec., 149) and evidence tending to show Price's identity.

In reply appellant introduced certified copies of the two indictments in New York against Price, and the testimony of certain witnesses tending to show that he was not in the District of Columbia on or about May 31, 1905, when certain of the conspiracies are charged to have been formed. He also called two officers of the Bureau of Statistics of the Department of Agriculture, whose testimony he claims disproves some of the material averments of the indictments.

Other evidence offered by him is not stated because he does not here raise the questions made thereby.

There are a number of the technical objections raised and discussed by the appellant Haas, which apparently counsel for appellant Price have deemed not of sufficient importance to merit consideration, inasmuch as they are not mentioned in the brief filed on his behalf; but, in addition to the grounds urged by Haas why he should be discharged, and which are discussed under heads III, subheads A, B, C (pp. 34 to 42), G, I, and J (pp. 45 to 51), and V and VI (pp. 53 to 64) of the Government's brief filed in that case, Price relies upon the following matters to show that the Government failed to prove probable cause of his guilt:

First. That the Government failed to establish his identity;

Second. That he is shown to have been innocent of a conspiracy in the District of Columbia by certain oral evidence introduced by himself before the commissioner, and the recitals in an affidavit made by him in another proceeding, but introduced before the commissioner by the Government; and

Third. That it is shown that the reports were not prepared from the approved information collected by the Bureau of Statistics.

The fact is especially emphasized that if the additional evidence relied on by appellant tends to prove a want of probable cause, yet it involves a weighing of evidence, which will not be done in these collateral proceedings. (*Green* v. *Henkel*, 183 U. S., 249.)

First. Appellant's identity was fully established.

W. S. Mayer, post-office inspector, testified that during the last two years he had been detailed in his official capacity to assist in the investigation of the so-called "cotton-leak" matter; that he had known appellant, Theodore H. Price, since the spring of 1908, and knew him to be the same person mentioned in the Washington indictments upon which the removal was sought (Rec., 21–28).

The Government also placed in evidence the affidavits of the United States attorney for the Southern District of New York, and of Price himself

introduced in opposition to the motion made in the Circuit Court there for consent to the institution of the removal proceedings. In his affidavit (Rec., 152) Price said that he was the same Price who had been twice indicted in the District of Columbia, and who was mentioned in the affidavit of the United States attorney (Rec., 157), to which Price's affidavit was a reply. These two indictments are described as numbers 26088 and 26089, being the same indictments upon which these removal proceedings are based. Moreover, the Directory of the city of New York shows there is but one Theodore H. Price in said city (Rec., 27).

There was not a syllable of evidence offered by Price tending to dispute his identity.

Second. The evidence does not rebut the prima facie case made by the introduction of the indictment that Price was guilty of the conspiracies alleged in the District of Columbia.

The evidence relied upon by appellant to show that he was not guilty of a conspiracy in the District of Columbia is:

1. The indictment found against Price, Haas, and Holmes in the Southern District of New York;

2. The evidence of Charles L. Matthews that he was a room clerk at the Waldorf-Astoria Hotel, New York City, and that late in the afternoon of May 31, 1905, Price registered at that hotel (Rec., 52, 53); the evidence of Charles B. Ward that he was superintendent and coachman for Price, that he saw Price about 9 o'clock a. m.

on May 30, 1905, in Princeton, N. J., and about quarter to 3 p. m. at his stable on the same day, and about 10 minutes past 7 p. m. passing his stable with a pair of horses, and that about 10 minutes of 8 o'clock on the next morning, May 31, he took Price to the station (Rec., 54); and the evidence of Russell Coates that Price was at his place of business in New York City at various times during the day of May 31, 1905 (Rec., 56); and

3. That portion of Price's affidavit filed by him in the previous removal case and presented by the Government on the hearing before the commissioner in these proceedings to prove his identity, which reads as follows:

> I am a cotton merchant, and have been engaged in that business in the city of New York for upward of twenty-five years, and during all of that time I have resided and still reside in the city of New York in the Southern District of New York, and I never resided or was engaged in business in the District of Columbia. During the period covered by the charges contained in said indictments, namely, between the 1st day of November, 1901 (and indeed for considerable period [illegible] thereto), and the 1st day of August, 1905, I was not in the District of Columbia on any occasion unless possibly while on a train passing through said District to some point farther south, and to the best of my recollection I was not in the District of Columbia at all during the said

> period. There was certainly no occasion during said period on which I was within the District of Columbia and there had any communication directly or indirectly with the defendants Haas and Holmes, or either of them (Rec., 153).

The inadmissibility, or if admissible, the weight to be attached to the New York indictments, is fully considered in the brief filed by the Government in *Haas* v. *United States*, point VI, (pp. 57 to 63); and we will here consider only the other two items of evidence.

1. The verbal testimony is entitled to no weight in determining whether or not Price entered into the conspiracy alleged in the indictment, (1) because he could have entered into the conspiracy in Washington and yet have remained in the city of New York, by either telegraph, by telephone, or by letter, *United States* v. *Thayer*, 209 U. S., 39; *Armour Company* v. *United States*, 209 U. S., 56, 74, 77; and there is no intimation in the record that he was not, on the 31st of May, 1905, in communication with his co-defendants in the city of Washington. (2) The allegations of the indictments may be sustained as well by proof of a conspiracy entered into upon any other date which is not barred by the statutes of limitations, as upon the 31st day of May, 1905. *Ledbetter* v. *United States*, 170 U. S., 606, 612.

2. The quotation from Price's affidavit, instead of refuting the allegations in the indict-

ments that he entered into the conspiracies described in the indictments in the District of Columbia, in fact shows to the contrary. It will be noted that Price carefully abstains from denying anywhere in this affidavit that he is not guilty of the offenses alleged in the indictments, but contents himself with the statement, in the last sentence of the quoted paragraph, that "There was certainly no occasion during said period on which *I was within the District of Columbia and there* had any communication, directly or indirectly, with the defendants Haas and Holmes or either of them. That is, he denies that he, *while himself* in the District of Columbia, had communication with Haas and Holmes, or either of them, but he does not intimate a denial that while Haas, and Holmes or either of them, were in the District of Columbia, he, *when elsewhere*, did not communicate and form a conspiracy with them.

This manifestly studied effort upon the part of Price to avoid any denial of entering into an actual conspiracy with Haas and Holmes, of the character mentioned in the indictments, and a mere denial that he made no such conspiracy *while he himself was in the District of Columbia*, should be, under the rules of weighing evidence, considered as an admission upon his part that he, *while elsewhere*, did enter into such conspiracy.

Furthermore, his denial only covers the period from the first day of November, 1904, to the first day of August, 1905, when, as heretofore stated,

conviction could be had on proof of conspiracy entered into at any other time within the period prescribed by the statute of limitations.

3. In the second and fifth counts of indictment No. 26088 it is alleged that defendants conspired on the 15th day of November, 1904, and at all times between that date and the 5th day of July, 1905, and of course evidence of Price's whereabouts on the 31st day of May, 1905, does not refute this allegation.

Third. The reports were prepared from approved information collected by the Bureau of Statistics.

On this subject the indictments charge that in acquiring information pertaining to cotton, the bureau made use of divers agencies, among others, correspondence with cotton planters, dealers, and ginners, through employees and agents in the cotton States, and through special investigations in the field; and that it was the duty of the employees of the bureau to prepare a true and accurate report from the information of the said crops obtained as aforesaid, without regard to the influence which said reports might have upon the market price of cotton. (Counts 1 and 2, No. 26088; Rec., 113, 118.)

Appellant called as a witness Victor H. Olmsted, who testified that he was now Chief of the Bureau of Statistics, and that he had been employed in that bureau off and on since 1901. (Rec., 72, 73.) The witness also explained the crop-report system in detail, and it appears there-

from that the cotton reports are issued on the 3d day of the month for six months in the year, beginning in June and ending in December, omitting November; that the June report shows the acreage of cotton planted and to be planted throughout the season (Rec., 93), as well as the condition of the growing crop on May 25; and that the next four reports show only the condition of the growing crop, while the last report, issued in December after the crop has been harvested, shows the total yield (Rec., 73–78, 87, 88).

During the entire season the bureau has four reporters, known as the township correspondents, the county correspondents, the state statistical agents, and the traveling field agent. For the June and December reports there are several additional sources of information.

In each township there are one or more reporters who at the appointed time send in to the bureau reports on the condition of the crop. These reports for the entire State are mathematically averaged by the clerks in the bureau, each township being given its relative weight according to the amount of cotton grown therein. The reports of the county correspondents are averaged in the same way, and when finally the result for each of the cotton-producing States, as shown by the county and township correspondents, is ascertained, the figures for the several cotton-producing States are handed to the statistician or to the associate statistician. The reports in June and De-

cember from the additional and special correspondents are handled in the same way (Rec., 77, 78, 87, 88).

In each cotton-producing State is a statistical agent who has reporting to him a number of correspondents. At the appointed time he sends direct to the statistician, or to the associate statistician, his report showing the condition of the crop, and in June the acreage planted, and in December the yield. The traveling field agent either sends or brings in a similar report covering the entire cotton area. (Rec., 81, 88, 89.)

When these reports are all in on crop-reporting day, the statistician, the associate, and several other employees of the bureau are confined under lock in the rooms where they prepare the final report from all of this information (Rec., 84, 95); this report is then submitted to the Secretary of Agriculture, and after he approves it is formally published to the world at large.

It is urged by appellant that the report of the statistician, when finally made, was simply an estimate and that it was not based upon the information which was collected at this enormous expense by the Department of Agriculture.

The reports of the various correspondents were many of them estimates, and the final crop report itself was in one sense an estimate, and in making up this report relative values were attached to the figures of the different classes of correspondents. (Rec., 81, 82.) Nevertheless, the crop report,

hen finally made, was based upon the informa-ion which had been gathered, and was intended o be a true and accurate report thereon. This act is proven by the testimony of the witness)lmsted.

On page 82 he says:

> The practice was not to average them but to consider them only in relation to the other and the relative value to be attached to the different classes of reports, and to fix a figure, as I remember, *within the limits of the figures before him, which in his opinion represented what ought to be the correct figure for each State*.

At page 91 he says:

> Those reports were the basis of the final estimate of the bureau, and other information, if credible and reliable, may have been used in connection with those reports, *but those reports themselves formed the basis of the estimate of the statistician* * * *. *It was the intention and the effort, I am convinced, to make as accurate and as true a report, based upon those sources of information I have described, as it was possible to make.*

It is therefore insisted that the judgment of the court below should be affirmed.

J. A. Fowler,
Assistant Attorney-General.
Jesse C. Adkins,
Special Assistant to the Attorney-General.

O

No. 885.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THEODORE H. PRICE, APPELLANT,

v.

WILLIAM HENKEL, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL., APPELLEES.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLEES.

In the Supreme Court of the United States

OCTOBER TERM, 1909.

THEODORE H. PRICE, APPELLANT,
v.
WILLIAM HENKEL, UNITED STATES MARSHAL for the Southern District of New York, et al., appellees. | No. 385.

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLEES.

I.

The order of removal should be sustained, notwithstanding the fact that Price has been indicted and bailed for trial in the Southern District of New York.

The first proposition relied upon by appellant is thus stated on page 21 of his brief:

> When an accused has been imprisoned or bailed for trial before a court of competent jurisdiction in the district where he lives, and where he was present when the alleged offense was committed, section 1014 does not authorize his subsequent removal from that district for trial in another, even though a court in the latter district may also have jurisdiction to try him.

In reply to this proposition we say:

First. *The Constitution does not give an accused the right of trial "in the district where he lives, and where he was present when the alleged offense was committed."*

The accused's place of residence, and his location when the alleged offense is committed, has nothing to do with the forum before which the trial is to be had.

In *In re Palliser* (136 U. S., 265), this court said:

> But the right thereby secured is not a right to be tried in the district where the accused resides, or even in the district in which he is personally at the time of committing the crime, but in the district "where the crime shall have been committed."

Likewise, in *Armour Packing Co.* v. *United States* (209 U. S., 76), the court said:

> But the constitutional provision does not require the prosecution of the defendant in the district wherein he may reside at the time of the commission of the offense, or where he may happen to be at that time, provided he is prosecuted where the offense is committed. The constitutional requirement is as to the locality of the offense and not the personal presence of the offender.

See also *Burton* v. *United States* (202 U. S., 387).

It had as well be insisted that the person against whom an offense is committed is entitled to have the case tried in the district of his residence, since he is as likely as the accused to reside in such district.

Some courts have indulged in the sentiment that an accused is entitled to a trial among his neighbors, but however such a sentiment may have prevailed a few centuries ago in England, it has no place in the modern administration of justice in this country. The purpose now is to secure jurors who have neither formed nor expressed any opinion as to the guilt or innocence of the accused, and who are entirely without feeling or sentiment in the matter.

Second. *The statutes clearly contemplate that where one is indictable for an offense in either of two or more districts he may be removed from one of such districts to another for trial.*

So much of section 1014, Revised Statutes, known as the removal statute, as is here material, reads as follows:

> For any crime or offense against the United States the offender may, by any justice * * * be arrested and imprisoned * * * *for trial before such court of the United States as by law has cognizance of the offense.* * * * And where any offender * * * is committed in any district *other than that where the offense is to be tried*, it shall be the duty of the judge of the district where such offender * * * is imprisoned seasonably to issue * * * a warrant for his *removal to the district where the trial is to be had.*

Section 731, Revised Statutes, reads as follows:

> When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been

> committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, *in the same manner as if it had been actually and wholly committed therein.*

It was insisted in argument that this section has no bearing upon this case. But why not? If the conspiracy had been formed by correspondence, or telephone, or telegraph, while Holmes was in Washington and Price and Haas in the Southern District of New York, it would necessarily have been begun in one district, and would probably have been completed in the other. If it had been made tentatively in one district and confirmed in the other, or if Price and Haas conferred in New York and Haas then came to Washington and there completed the conspiracy with Holmes, which very likely is the manner in which the conspiracy was formed, the statute would certainly be applicable.

But there is the best of reasons why this statute was intended to apply especially to conspiracies of this character, and, in fact, to cases precisely like this one. Section 5440, Revised Statutes, under which these indictments are drawn, and section 731, were not only originally enacted in the same statute, but were in the same section, the two constituting section 30 of the act of March 2, 1867 (14 Stat., 484).

As has been repeatedly observed by this court, two things are necessary to create an offense under section 5440—one the formation of the conspiracy and the other the commission of an overt act; and it is apparent that in the enactment of that part of the

section which now constitutes section 731, Revised Statutes, Congress had reference to the district in which the conspiracy is formed, and the district in which an overt act or acts are committed in pursuance thereof.

In any event, this section is but the declaration of the law which is applicable to a case cognizable in two or more districts. Neither in section 1014 nor in section 731 is there any intimation that when the Government elects to prosecute an accused before the court of one district, having jurisdiction, he has any right to resist removal thereto upon the ground that he resides in a district in which he *may also* be indicted. The latter part of section 1014 speaks of the removal of an offender "committed in any district other than that where the offense *is to be tried*," not where the offense is "*triable*," which would have been the word used had it been intended not to provide for his removal from such a district; and it further provides for his removal to "the district *where the trial is to be had*," which is certainly the district in which the indictment is found and the prosecution is being pressed.

Since the Government had these indictments found in the District of Columbia, it is but fair to presume that it intended trials to be there had upon them, and that presumption became a certainty when it had the defendants taken into custody and proceedings instituted for their removal; and this certainty was further confirmed when, at the instance of its highest legal representative, it had all proceed-

ings under the New York indictments stayed until the prosecutions in the District of Columbia could be disposed of. Then the District of Columbia is "*the District where the trial is to be had*," and to which, under the statute, the Government has a right to have the accused removed.

But it would appear that the language in section 731 that the offense mentioned "may be *dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein*," could leave no doubt upon this question. This clearly means that not only may the offense be tried in either district, but that it may be "dealt with;" that is, that every preliminary step may be taken to secure a trial precisely the same as if the offense had been *wholly* committed in such district. When the law provides that a trial may be had in a certain district, it necessarily implies that a removal of the accused may be had to such district; otherwise how could the trial be had there? But this phase of the question was settled by this court in *In re Palliser* (136 U. S., 265). Palliser was accused of attempting to bribe a postmaster to sell stamps otherwise than for cash, the offer having been made by letter written in New York City and sent to the postmaster at Black Hall, Conn. It was insisted on behalf of Palliser that he should have been indicted in New York. The court held that the defendant was indictable in the district court of Connecticut, and deemed it unnecessary to determine whether he

might be also indicted in the Southern District of New York, using the following language:

> In the case before us, the offense charged being an offer of money, or a tender of a contract for the payment of money, contained in a letter mailed at New York and addressed to the postmaster in Connecticut, to induce him to violate his official duty, it might admit of doubt whether any offense against the laws of the United States was committed until the offer or tender was known to the postmaster and might have influenced his mind. But there can be no doubt at all that if any offense was committed in New York, the offense continued to be committed when the letter reached the postmaster in Connecticut; and that, if no offense was committed in New York, an offense was committed in Connecticut; and that in either aspect the district court of the United States for the District of Connecticut had jurisdiction of the charge against the petitioner. Whether he might have been indicted in New York is a question not presented by this appeal.

Since the court considered the determination of the question whether the defendant might have been indicted in New York immaterial, the result of the holding necessarily was that the accused could be *removed to the district court of Connecticut for trial, although he might have been subject to indictment in New York.*

Third. *The fact that indictments have been found against the accused in the Southern District of New*

York, for some of the same conspiracies, and he put under bail to answer such indictments, did not change his status and give him, at his option, a right of trial in that district.

In vain will the statutes be searched for a single intimation, that an accused who resides in one district, in which he may be indicted, is vested with any additional right as to the *situs* of the trial by the fact that an indictment has been returned against him and he put under bail in that district. There is, we confidently assert, no principle of law which authorized the commissioner to take such a fact into consideration on a hearing for removal. In acting upon cases of removal, as has been repeatedly held, the commissioner is acting in a judicial capacity. He must hear and determine the question upon the evidence as applied to fixed principles of law, and his judgment is not a matter of discretion. But let it be conceded that the commissioner has a right to consider whether a removal under the circumstances would be oppressive, and exercise his discretion in the matter, this court can not, in these collateral proceedings, overrule that discretion when once exercised. The fact that the Government must take the initiative in prosecutions necessarily gives to it the choice of forums when it may proceed in either of two or more districts. Suppose the Government had indicted the accused in the Southern District of New York alone, and he had been there arrested and put under bail; could he have forced the Government to try him in that dis-

trict? He would certainly have had a right to require some disposition to be made of the case without unreasonable delay, but the Government could have elected whether it would try or dismiss. Now, the Government saw proper for some reason, which should be deemed a good and proper one, to return indictments against the accused in both the Southern District of New York and the District of Columbia at the same time. It certainly has no right to have him *tried* upon both sets of indictments in so far as they charge the same offense; but it is equally clear that he can not choose upon which indictments he shall be tried. The choice still remains with the Government, and that choice can not be taken away until he has been placed in jeopardy under one or the other of them.

As above stated, however, here the Government has clearly indicated "where the trial is to be had," by asking and obtaining a stay of the proceedings under the New York indictments and by demanding that the accused be removed for trial to the District of Columbia. It may be doubtful whether the stay of proceedings in New York should have been granted over his protest, if such protest was entered. He had a right to a disposition of that case within a reasonable time, but not a right to permit it to remain there and interpose it as a defense to the removal proceedings.

Notwithstanding the suggestions in counsel's brief to the contrary, we insist that the action of the Government in this matter was entirely proper and not

in the least oppressive or tyrannical. In 1905 it had indicted Haas, Peckham, and Holmes for offenses similar to some of the alleged offenses set out in the indictments under which Haas and Peckham are now sought to be removed, but relating entirely to the crop reports issued in 1904. Removal proceedings were instituted thereunder, but failed. It was manifest that the District of Columbia was the actual *situs* of these offenses, the conspiracies in a large measure having there been entered into and many of the overt acts there committed. We say in a large measure, because such evidence as is in the records of this and the Haas cases shows that some of the parties would talk the matters over in New York and then a representative would come to Washington and there confer with Holmes. It was felt, however, that there was some uncertainty as to whether removal proceedings would be successful; and it was certain that the offenses would be barred by the statute of limitations before a final determination of such proceedings could be had. Under these conditions the Government deemed it advisable to have indictments returned in both jurisdictions, and if possible have the defendants all removed to the District of Columbia and there tried; but if it should fail in the effort to procure their removal, then to try the New York defendants there, although its case would be much weaker. If the Government fails to procure their removal, its cases are in this peculiar condition: Holmes can not be removed to New York and tried there, because he is indicted in the District of Columbia; consequently

it would necessitate two long and expensive trials, although the defendants are co-conspirators and are joined in the same indictments and should be tried together.

It is easy to imagine an extreme case where the action of the Government under the principles here insisted upon would be oppressive, but no one ever heard of the Government seeking to apply them in any such case, and there is not the least probability that it would ever do so. If it were animated by an evil spirit, many of its criminal laws could be used as instruments of tyranny and oppression. On the other hand, there would be a far greater probability of a holding with appellant's contention resulting in many instances in a denial of justice.

Cases just as extreme may be imagined on behalf of the Government. For instance, suppose a number of persons, one of whom resides in each judicial district of the United States, were to enter into an unlawful conspiracy by mail or telegraph; and suppose, as a matter of precaution, the Government should procure indictments against them in all the districts. Can it be insisted with reason that it could be compelled to proceed with a separate trial in each district, and there is no method by which it could procure a trial at one place of all or a part of them together?

To the suggestion that oppression and tyranny might result from the adoption of the rule contended for by the Government, the following language used

by this court in *United States* v. *Keitel* (211 U. S., 394, 395) is pertinent:

> Nor do we deem it necessary to do more than briefly refer to the elaborate statements at bar concerning constructive crimes and the fear which also found expression in the opinion below, that if the words "to defraud in any manner or for any purpose" receive a broad significance, charges of crime may be hereafter predicated upon acts not prohibited and innocuous in and of themselves, and which, when they were committed, might have been deemed by no one to afford the basis of a criminal prosecution. *It will be time enough to consider such forebodings when a case arises indicating that the dread is real and not imaginary.* That they are mere phantoms when applied to the case here presented results from the obvious consideration that the conspiracy charged had for its purpose the doing of acts which were in clear violation of the direct prohibition of the coal-land laws, a prohibition whose meaning and effect had been unmistakably announced and applied by a decision of this court rendered many years before the formation of the conspiracy here charged.

Fourth. *The fifth and seventh counts of indictment No. 26088 charge offenses which are not charged in the New York indictments.*

In the fifth count the conspiracy to defraud was that Holmes would furnish to Haas and Price the information to be obtained in each crop report, and whenever such information should be furnished

Price, he, before the publication of the report, would engage in buying or selling cotton, as the case might be, and after the report had been finally published Price would sell or buy the cotton theretofore handled, and the profits thus realized would be divided among the conspirators; and among the overt acts committed pursuant to this conspiracy, and not charged in the New York indictments, it is alleged that Price, after receiving the information from Holmes, through Haas, did speculate, realizing the sum of $750,000, of which he gave Haas the sum of $125,000. (Rec., p. 127, 128, 129.)

In the seventh count the conspiracy charged was that Holmes was to cause the report to be prepared to show the number of acres planted in cotton only up to the 25th of May preceding, and as soon as the report should be published Price was to telegraph to the bureau inquiring if the report included alone the number of acres planted up to May 25, and Holmes was to cause a reply to be sent that the report included only the acreage planted to May 25; and the overt acts there charged, which are nowhere else mentioned in any of the indictments, were that on May 23, 1908, in New York, Price promised Holmes a large sum of money, the amount being unknown, which sum Price gave to Holmes on May 25, 1908. (Rec., pp. 133, 134.)

The conspiracies charged in these counts are entirely distinct from any conspiracy charged in either of the New York indictments, and, as stated, certain of the overt acts charged to have been com-

mitted in connection therewith were not mentioned in those indictments; and Price could not, therefore, be tried for these offenses in New York.

Fifth. *The other conspiracies charged in the New York indictments may have been entirely different from those charged in the indictments found in the District of Columbia.*

The only evidence of identity is the fact that they are charged in the same language in both sets of indictments, with the exception that in one set the conspiracies are charged to have been formed in New York, while in the other indictments they are alleged to have been formed in the District of Columbia. But this difference might very well be regarded as vital, and sufficient to show that the two sets of conspiracies were entirely different.

II.

This is a collateral attack on the proceedings before the commissioner, and the only thing now to be determined is whether or not the commissioner had jurisdiction to order a removal.

In *Greene* v. *Henkel* (183 U. S., 261), it was said:

> Upon this writ the point to be decided is *whether the judge who made the order for the removal of the defendants had jurisdiction to make it, and if he had, the question whether upon the merits he ought to have made it is not one which can be reviewed by means of the writ of habeas corpus.*

Jurisdiction upon that writ in such a proceeding as this does not extend to an examination of the evidence upon the merits. The matter for adjudication is similar to that which obtains in cases of international extradition. In such case, if there is competent legal evidence on which the commissioner might base his decision, it is enough, and the decision can not be reviewed in this way. (*Bryant* v. *United States*, 167 U. S., 104.)

III.

The jurisdiction of the commissioner depends, first, upon whether the statutes create either of the offenses charged or attempted to be charged in the indictments; and, second, whether there was any material evidence introduced which tended to show that such offense had been committed, and if so, that Price was criminally connected therewith.

There are two classes of counts. One class charges conspiracies to defraud the Government, the frauds to be perpetrated by procuring Holmes to impart information about the cotton-crop report, which, under the rules and regulations of the Department of Agriculture he ought to have kept secret, and by procuring Holmes to make false and inaccurate reports. The other class charges conspiracies to bribe Holmes to impart information which he was required to keep secret, and to make false and inaccurate reports.

First. The statutes create the offenses charged.

(1) *Under the statutes it was a governmental function to gather information with reference to cotton crops and to disseminate same.*

Section 520 of the Revised Statutes provides that the general designs and duties of the Department of Agriculture shall be to "*acquire and to diffuse among the people of the United States useful information on subjects connected with agriculture.*"

Omitting other acts, which are mentioned on pages 12 to 14 of the government's brief filed in the Haas case, the appropriation act of 1892 provided as follows:

> *Collecting agricultural statistics, Division of Statistics.*
>
> Collecting domestic and foreign agricultural statistics, expenses of local investigations and compilations, and necessary traveling expenses; statistical publications furnishing data for permanent comparative records; *compiling, writing, and illustrating statistical matter for monthly, annual, and special reports*, and the necessary expenses of the same, including papers and envelopes, postal cards, and postage stamps, one hundred thousand dollars: *And provided further*, That the monthly crop report issued on the tenth day of each month shall embrace only a statement of the condition of the crop by States and in the United States, with such explanations and comparisons with other months and years as may be useful for illustrating the above matter, *and that it shall be submitted to the Secretary of Agriculture, who shall officially approve the report before it is issued or published.*

The appropriation act of 1904 changed the dates of the reports to the 3d and 10th, and the cotton crop report was thereafter issued on the 3d.

Section 161, Revised Statutes, reads as follows:

> The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property pertaining to it.

Thus the Department of Agriculture was expressly authorized to do the very things which it is alleged in these indictments it was doing, and to adopt rules to govern the conduct of employees while performing those services—rules to govern not only the gathering of the information, *but also the diffusing of it*. And the fact that the reports were first to be submitted to the Secretary and approved by him, before publication, and were to be published on specific days, certainly authorized a rule that the information should be withheld until such approval and the days specified.

But the court will not consider whether the department had the power to adopt rules. In *Benson* v. *Henkel* (198 U. S., 1, 9, 13) the grounds of objection to the indictment were thus stated by the court:

> (1) Objection is made to the indictment upon the ground that at the time of payments to these officers the special agents' reports had not come into their possession or knowledge, and there is no allegation to prove that it ever

would; that they had no duty concerning it; that it was not shown that they ever would have such duty; and that a charge of bribery can not be based upon payment to an officer to induce him to perform an act as to which he has no duty, and may never have any duty. (2) *That neither of these officers was forbidden by any lawful duty to reveal to Benson the contents of any report, even if they should ever come into a position to do so. Upon these grounds it is insisted that the indictment charges no offense against the United States under section 5451.*

In commenting upon the duty of the commissioner to inquire into these matters, the court said:

> The commissioner was not required to determine for himself whether the statute applied to reports which had not yet been filed, and which might never be filed, or whether the words of the statute "which may at any time be pending, or which may by law be brought before him in his official capacity," apply to the pendency of an obligation not to reveal the contents of a paper then in his possession. This was peculiarly a subject for examination by the court in which the indictment was found.
>
> Like comment may be made with reference to the second objection, that neither of these clerks was forbidden by any lawful authority to reveal the contents of such reports, upon the ground that there was no statute imposing such obligation. *But it is clearly for the court to say whether every duty to be performed by an official must be designated by statute, or*

> *whether it may not be within the power of a head of department to prescribe regulations for the conduct of the business of his office and the custody of its papers, a breach of which may be treated as an act in violation of the lawful duty of an official or clerk.* (*United States* v. *Maccdaniel*, 7 Pet., 1, 14.)

(2) *To corruptly impart information contrary to the rules of the department, and to willfully and corruptly make false and inaccurate reports were frauds upon the Government.*

This question is discussed at length on pages 16–30 of the Government's brief filed in the Haas case, to which reference is made.

(3) *To bribe Holmes to impart information against the regulations of the department or to make false reports was an offense under section 5451, and to conspire to bribe him to do so was an offense under section 5440.*

Section 5451 provides:

> Every person who promises, offers, or gives, or causes or procures to be promised, offered, or given, any money or other thing of value, or makes or tenders any contract, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, to *any officer of the United States or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government thereof, * * * with intent to influence his decision or action on any question, matter, cause, or proceeding*

> *which may at any time be pending*, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any action in violation of his lawful duty, shall be punished as prescribed in the preceding section.

That Holmes was an officer within the meaning of this statute, or was at least "a person acting for or on behalf of the United States in an official function," is considered in the Haas brief, pages 34–38.

Second. There was material evidence before the commissioner to show that Price is guilty of the offense charged.

We entirely disregard all questions made as to the sufficiency of the indictments as a pleading, because such questions can not be considered in these proceedings. The indictment is not here introduced as a pleading, but *solely as evidence of probable cause*.

Upon this question, in *Benson* v. *Henkel* (198 U. S., 12), the court said:

> *It must be borne in mind that the indictment is merely offered as proof of the charge originally contained in the complaint, and not as a complaint in itself or foundation of the charge, which may be supported by oral testimony as well as by the indictment.* When the accused is arraigned in the trial court he may take advantage of every insufficiency in the indictment, since it is there the very foundation of the charge, but to hold it to be the duty of the commissioner to deter-

> mine the validity of every indictment as a pleading, *when offered only as evidence*, is to put in his hands a dangerous power, which might be subject to serious abuse.

With reference to the amount of evidence necessary to sustain, in a *habeas corpus* proceeding, the order of removal, the rule is substantially the same as with reference to the finding of facts by a jury; that is, that the evidence will not be weighed by the court, but the order will be sustained if there is *any* evidence upon which it can rest. Thus, in *Hyde* v. *Shine* (199 U. S., 84) this court said:

> In the federal courts, however, it is well settled that upon *habeas corpus* the court will not weigh the evidence, although if there is an entire lack of evidence to support the accusation the court may order his discharge. In this case, however, the production of the indictment made at least a *prima facie* case against the accused, and if the commissioner received evidence on his own behalf, it was for him to say whether upon the whole testimony there was proof of probable cause.

Then we must take the allegations of each and every count in the indictment, together with the other evidence, and determine whether or not *there anywhere appears therein any material evidence to sustain the commissioner's finding of probable cause.*

The following are the special matters as to which it is insisted that the evidence is insufficient:

(*a*) *That there is no evidence that it was contemplated when the conspiracy was formed that Price and Haas*

would be persons unauthorized to receive the information when it was to be imparted to them by Holmes. (Appellant's brief, p. 8.)

This applies only to counts alleging fraud by divulging information.

The following allegation appears in the first count of indictment No. 26088:

> The said Theodore H. Price and Moses Haas, who then and there were neither officers nor employees either of the said department or of the said bureau, and who then and there were persons not in any manner authorized to have or know the information last aforesaid, or be informed as to the probable contents or character of the said crop report in advance of its official issuance and publication, or without such report being first submitted to and officially approved by the said Secretary, and who well knew all the premises in this indictment above set forth, were thereafter, and in advance of the said cotton-crop report, to obtain and receive from the said Edwin S. Holmes, junior, and the said Edwin S. Holmes, junior, also then well knowing the said premises, was to give and divulge to them, the said Theodore H. Price and Moses Haas, information which as aforesaid had and would come and be known to him, the said Edwin S. Holmes, junior, in his said capacity as an officer and employee of the said department and bureau, and this without the said cotton-crop report being first submitted to and officially approved by the said Secretary of Agriculture. (Rec., p. 114.)

The following overt acts are charged in the first count of indictment No. 26088:

On May 31 Price and Haas met in New York City to confer concerning the conspiracy.

On June 1 Haas went from New York to Washington.

On June 1 Holmes imparted information to Haas in Washington.

On June 2 Holmes imparted information to Haas in Washington.

On June 2 Price received the information in New York. (Rec., pp. 115, 116.)

It thus appears that on the very day of the conspiracy, when it is expressly alleged that Haas and Price were not such persons as could be lawfully given the information, the offense was completed by the commission of an overt act, and that on both the first and second days following the information was actually imparted. The allegations of the indictment further show that the information was to be divulged *unlawfully and as the result of a corrupt scheme;* and the commissioner was therefore well warranted in finding that it was contemplated that this information should be given when Haas and Price were not entitled to receive it.

(*b*) *That it is shown that Holmes, as associate statistician, might have had the right to impart the information.* (Appellant's brief, p. 108.)

This likewise applies only to counts for fraud to be perpetrated by imparting information.

This contention is based on the allegations which appear in several places in the indictments, that Holmes was associate statistician, and as such he, in the absence of the statistician, was the head of the Bureau of Statistics; and the order of the Secretary, dated March 20, 1897 (Rec., p. 103), that no employees should give out any information "without the written approval of the chief of the bureau, division, or office to which they may be assigned for duty, and by such approval the chief of any bureau, division, or office shall assume all responsibility to the Secretary for the statement approved and its publication." It is insisted that since he might be chief of the bureau, then he might have had under this order the right to impart the information when given. But what is the evidence to the contrary? In the first count of indictment No. 26089 (Rec., pp. 140, 141) it is alleged:

> That during the time and times aforesaid a custom and practice prevailed in the said Department of Agriculture, established and sanctioned by the said Secretary, under which the giving out to the public of any information collected by the said Bureau of Statistics or its officers or its said employees, to be used in the preparation of or contained in any of said crop reports, was prohibited, and the keeping of such information secret was required, except such information as was contained in said crop reports when and after the same had been officially issued and published.
>
> And that during the time and times aforesaid the said statistician and associate sta-

tician and the other officers and employees aforesaid of the said Bureau of Statistics were charged with the duty of honestly and carefully guarding and keeping secret and of not divulging to any person not employed in or connected with said Bureau of Statistics any information acquired by him or them in the course of preparing and assisting in preparing the said crop reports and in collecting statistics and compiling statistical matter for use in the preparation of said crop reports, or any of the matters and things and other information which might be contained in any of said crop reports, until said crop reports had been prepared, officially approved, and issued and published as aforesaid, and thereafter said duty of maintaining secrecy as aforesaid continued save and except as to the matters and things so officially made public in said reports.

And that it was Holmes's duty—

Honestly and carefully to guard and keep secret and not to divulge to any person not employed in or connected with said Bureau of Statistics any of said statistics and statistical matter or information from which said crop reports, including said cotton crop reports, were to be prepared, and of the matters and things and other information which were to be contained in any of the said crop reports, including said cotton crop reports, knowledge of which was so, as aforesaid, acquired by him, the said Edwin S. Holmes, jr., as such associate statistician, until the said reports had been prepared, officially approved, and issued and published as aforesaid; and it

> was the duty of the said Edwin S. Holmes, jr., as such associate statistician, to thereafter honestly and carefully guard and keep secret and not divulge to any person not employed in or connected with said Bureau of Statistics any of the statistics and statistical matter and matters and things and other information last aforesaid, knowledge of which was so, as aforesaid, acquired by him, except such matters and things and other information as were included in and officially made public in said reports.

Furthermore, the department, on December 19, 1901, made an order that—

> No information in regard to transactions of an official character is to be communicated to anyone not connected with the public business.

And the statute forbade publication until after approval by the Secretary, and designated certain days for publication. Consequently, both the law and the evidence sustain the finding of the commissioner on this point.

(c) *That it is not shown that in the conspiracy to have Holmes make inaccurate reports, the inaccuracy was to be any other than that resulting from honest mistake of judgment or was in the nature of the report inevitable.* (Appellant's brief, p. 111.)

The following are some of the allegations of the indictments upon this subject:

> And that during the time and times aforesaid it was the duty of the said statistician and the said associate statistician and said

other officials and employees aforesaid of the said Bureau of Statistics *to prepare a true and accurate report upon each of the said crops, from the information as to said crops obtained as aforesaid*, and without regard to the influence which any such report might have upon the market price of the crop therein mentioned. (Indictment 26089, count 1, Rec., p. 140).

And that during the period last aforesaid it was the duty of said Edwin S. Holmes, jr., as such associate statistician, whenever he prepared or assisted in preparing any of said reports, to prepare and assist in preparing a true and accurate report from the information as to said crops obtained as aforesaid and without regard to the effect which such report might have upon the market price of the crop therein mentioned. (Indictment 26088, 2d count, Rec., p. 119.)

In violation of the duty of him, the said Edwin S. Holmes, jr., to prepare and assist in preparing the said cotton crop reports *truly and accurately from the information as to the said crops obtained as aforesaid*, and without regard to the influence of such reports upon the market price of cotton, the said Edwin S. Holmes, jr., in assisting in preparing the said cotton crop report to be issued in the month of June then next following, *was to cause and procure the said report to state that there has been planted in cotton throughout the United States a greater number of acres of land and that the condition of the cotton crop was better than would be shown by such report if it had*

been based upon the information as to said cotton crop obtained as aforesaid and had been truly and accurately prepared. (Indictment 26088, 2d count, Rec., p. 120.)

In the first and second counts of indictment No. 26088 (Rec., pp. 113, 114, 116, 117) it is described in detail from what sources, by whom, and in what manner the information upon which the report is based is gathered. It appears, therefore, from the allegations of the indictments that certain information was to be obtained and that the reports were to be based on that information, but that under the conspiracy Holmes was, as the result of the bribery, to make the reports appear differently from what they would have appeared had they been honestly computed from this information.

(*d*) *That the evidence shows that Price was not in the District of Columbia during the time mentioned in the indictments, and could not, therefore, have committed any of the offenses there.*

This question is discussed on pages 4–8 of the brief heretofore filed by the Government in this case.

It is insisted, therefore, that the judgment of the court below should be affirmed.

J. A. Fowler,
Assistant Attorney-General.
Jesse C. Adkins,
Special Assistant to the Attorney-General.

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PRICE *v.* HENKEL, UNITED STATES MARSHAL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 385. Argued January 7, 1910.—Decided February 21, 1910.

Haas v. *Henkel*, *ante*, p. 462, followed as to jurisdiction of commissioner under § 1014, Rev. Stat., to remove accused who has also been indicted in the district from which removal is sought.

One good count in an indictment, under which a trial may be had in the district to which removal is sought, is enough to support an order of removal in *habeas corpus* proceedings, *Horner* v. *United States*, 143 U. S. 207, even though accused may be held to bail in the district from which removal is sought on an indictment of which some of the counts are similar.

But an indictment which alleges that the offense was committed in the district where found, does not conclusively destroy the *prima facie* case made in a removal proceeding by the indictment found in the district to which removal is sought and which alleges that the offense was committed therein, and if the commissioner also heard evidence upon which he based his decision, that decision is not open to review in *habeas corpus* proceedings.

In this case the independent evidence which was offered to show that accused was not in the district where the indictment was found was not conclusive.

163 Fed. Rep. 904, affirmed.

THE facts are stated in the opinion.

Mr. DeLancey Nicoll, with whom *Mr. John D. Lindsay*, *Mr. Howard S. Gans* and *Mr. Thomas Staples Fuller* were on the brief, for appellant.

Mr. Jesse C. Adkins, Special Assistant to the Attorney General, with whom *Mr. Assistant Attorney General Fowler* was on the brief, for appellee.

MR. JUSTICE LURTON delivered the opinion of the court.

The appellant, Theodore H. Price, was, on March 1, 1909,

committed by a United States commissioner for the Southern District of New York to the custody of the appellee, as marshal for that district, to await an order of removal to the District of Columbia, for trial upon two indictments, numbered respectively 26,088 and 26,089, being two of the indictments considered in the case of *Haas* v. *Henkel*, just disposed of. Price thereupon filed his petition in the Circuit Court of the United States for the Southern District of New York, alleging that his imprisonment was unlawful and in violation of the Constitution of the United States, and praying for a writ of *habeas corpus* and certiorari, and that he might be discharged from such arrest. Upon a hearing, his petition was dismissed and he was remanded to the custody of the marshal. From this order he has prayed this appeal.

This appeal and that of Haas were argued together, the difference between the two being slight. The two New York indictments against Price which he had been held to answer when these removal proceedings were begun were numbered 307 and 308. The first charged him with having entered into a conspiracy with Moses Haas, Edwin S. Holmes, Jr., and other persons unknown, to defraud the United States, and the other charged him with having conspired with Haas to bribe Holmes, an official in the Statistical Bureau of the Department of Agriculture, to violate his duty. These indictments allege the conspiracy to have been formed in the Southern District of New York. They are in all respects similar to the two District of Columbia indictments against the same persons, which lay the *locus* of the conspiracy in the District of Columbia, except that certain counts in the latter indictments charge particular offenses not charged in either of the New York indictments.

It is now insisted that the order of the commissioner committing appellant to the custody of the marshal to await a removal is void:

1. Because § 1014, Rev. Stat., does not authorize a removal from the district where an accused is found when he

is there under bail to answer local indictments for the same offense.

2. That the commitment to await an order of removal was illegal and an abuse of power, because the District of Columbia indictments did not substantially charge any offense against the United States.

3. That the record certified by the commissioner under the certiorari issued by the Circuit Court does not show any evidence justifying a conclusion that there was probable cause to believe that the appellant had committed any crime in the District of Columbia.

As two of the counts included in one of the District of Columbia indictments are for particular offenses, similar in character, but not identical with those covered by either of the two New York indictments, it is apparent that appellant has not been held in New York to answer all of the offenses which he is charged with having committed in the District of Columbia, and could not be brought to trial under the New York indictments for the offenses charged by the fifth and seventh counts of one of the District of Columbia indictments. This alone serves to take the case out of the precise situation presented by the first objection against the order made by the commissioner. If there is one good count under which a trial might be had in the district to which the removal is sought, it is enough to support an order in a *habeas corpus* proceeding. *Horner* v. *United States*, 143 U. S. 207, 214.

But for the reasons already stated in the opinion in the *Haas case*, just handed down, we are of opinion that absolute identity in the two sets of indictments does not operate to defeat a removal, if the Government elect to try in another district, and that the only function of a commissioner before whom a removal complaint is made in such a situation is to be satisfied that there is probable cause to believe that the accused is guilty of an offense charged to have been committed in the district to which the removal is sought. This case, upon this point, as well as upon the point that the two indictments here

involved do not sufficiently charge an offense against the United States, is governed by the opinion and judgment in the *Haas case*.

This brings us to the only question which is not necessarily concluded by the opinion in the *Haas case*, namely, whether there was any substantial evidence before the commissioner upon which he might, in the exercise of his jurisdiction, decide that there was probable cause for believing that appellant had committed, within the District of Columbia, the offenses charged in the indictments against him found in that district.

That at least a *prima facie* case for the removal was made by the introduction of the indictments returned against him in the District of Columbia is not disputable. That much efficacy is attributed to a certified copy of an indictment found in a competent court of another district when put in evidence in a removal proceeding. *Bryant* v. *United States*, 167 U. S. 104; *Greene* v. *Henkel*, 183 U. S. 249; *Hyde* v. *Shine*, 199 U. S. 62; *Beavers* v. *Henkel*, 194 U. S. 73. But the evidence of probable cause afforded by the indictment is not conclusive. For this reason it has been held that the refusal of a commissioner to hear evidence offered for the purpose of showing that no offense had been committed triable in the district to which removal was sought, would be a denial of a right secured under the Constitution. *Tinsley* v. *Treat*, 205 U. S. 20. But in this case there was no closing of the door to evidence offered to show a want of probable cause. Copies of the New York indictments against appellant for many of the same offenses were received in evidence, as tending to show that the conspiring, if any there was, had been done in New York and not in the District of Columbia. Some evidence tending to show that Price was not in the District of Columbia at the time when the conspiracies are charged to have been formed was also introduced. There was also some evidence offered questioning the identity of the appellant with the person accused by the District of Columbia indictments. The probative weight of certified copies of the New York indictments is necessarily

limited to such counts as are identical in the two sets of indictments. This would leave counts five and seven of indictment No. 26,088 unaffected as evidence of probable cause, and justify the order of commitment, although there might be conclusive evidence that the offense charged in the other counts had not been committed in the District of Columbia as charged. *Horner* v. *United States*, 143 U. S. 207.

But it cannot be conceded that the introduction of copies of the New York indictments operated to destroy the evidential effect of the indictments found in the District of Columbia, even as to the identical counts. In the case of *Haas* v. *Henkel* we held that such evidence did not so conclusively destroy the evidence afforded by copies of the District of Columbia indictments as to leave no testimony upon which the commissioner might, upon the whole case, decide that there was proof of probable cause.

The commissioner had before him competent evidence in the certified copies of the District of Columbia indictments upon which he might base a conclusion of probable cause. At most, the New York indictments, together with the evidence tending to prove that appellant had not been in the District of Columbia at any of the times when the conspiracy was said to have been formed, only made an issue which the commissioner had jurisdiction to decide, and when we find from the proceedings before him that he did hear such evidence upon which he might base his decision, that decision is not open for review upon a petition for a writ of *habeas corpus*. *In re Oteiza y Cortes*, 136 U. S. 330; *Bryant* v. *United States*, 167 U. S. 104; *Greene* v. *Henkel*, 183 U. S. 249, 261; *Hyde* v. *Shine*, 199 U. S. 62, 84. This is the rule as stated by Mr. Justice Brown, speaking for the court in *Hyde* v. *Shine*, cited above, where it was said:

"In the Federal courts, however, it is well settled that upon *habeas corpus* the court will not weigh the evidence, although, if there is an entire lack of evidence to support the accusation, the court may order his discharge. In this case, however, the

production of the indictment made at least a *prima facie* case against the accused, and if the commissioner received evidence on his behalf it was for him to say whether, upon the whole testimony, there was proof of probable cause. *In re Oteiza*, 136 U. S. 330; *Bryant* v. *United States*, 167 U. S. 104. The requirement that the usual mode of process adopted in the State shall be pursued refers to the proceedings for the arrest and examination of the accused before the commissioner, but it has no bearing upon the subsequent independent proceeding before the Circuit Court upon *habeas corpus*. In this case the commissioner did receive evidence on behalf of the appellants, and upon such evidence found the existence of probable cause and committed the defendants, and, upon application to the District Judge for the warrant of removal, he reviewed his action, but did not pass upon the weight of the evidence."

The evidence independent of that afforded by the New York indictments, relied upon to show that appellant was not in the District of Columbia when the conspiracy is charged to have been formed, has been examined. It cannot be said to be at all conclusive. First, it leaves out of consideration the fact that the indictments may be sustained by evidence of a conspiracy formed at dates before the finding of the indictment, other than those named, if not barred by the statute of limitations. *Ledbetter* v. *United States*, 170 U. S. 606, 612. Second, it does not exclude the possibility that the conspiracy may have been formed in the District of Columbia without appellant being physically present when the conspiracy was formed. *In re Palliser*, 136 U. S. 257, 265; *Burton* v. *United States*, 202 U. S. 344, 387; *United States* v. *Thayer*, 209 U. S. 39, 43. In *Burton* v. *United States*, cited above, it was said by this court that "the constitutional requirement is that the *crime* shall be tried in the State and district where committed, not necessarily in the State or district where the party happened to be at the time."

Upon the whole case, we are satisfied that there is not shown that entire absence of evidence, which, upon an appeal

like this, would require us to hold that the decision that there was probable cause was void as not based upon any evidence.

Final order affirmed.

BREWER, J., concurring.

I concur in affirming the orders of removal in these cases, but my concurrence must not be taken as holding that the indictments will stand the final test of validity or sufficiency. Assuming that there is a doubt in respect to these matters, as I think there is and as seems to be suggested by the opinion in No. 367, I am of the opinion that such doubt should be settled by direct action in the court in which the indictments were returned, and not in removal proceedings.

MR. JUSTICE MCKENNA concurs in the result, but reserves opinion whether the facts alleged in the indictment constitute a conspiracy to defraud the United States.